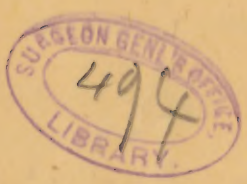
BELL (Clark.)

Malpractice.



Bell (C.)

MALPRACTICE.*

BY CLARK BELL, ESQ.

The law upon this subject may be stated briefly as follows:—

Malpraxis may be defined as bad or unskillful practice in a physician or surgeon, whereby the health of the patient is injured.

Negligent Malpractice embraces those cases where there is no criminal intent or purpose, but gross negligence in bestowing that attention which the situation of the patient requires.

Ignorant Malpractice is the administration of medicines, or the treatment of the disease, fracture, or injury in a way calculated to do injury which actually does harm, and which a properly educated, skilled, and scientific medical man or surgeon would know was not proper in the case:

Elwell's Malpractice, 198 and 243; 2 Bouv. L. Dict., 149.

Physicians and surgeons, by holding themselves out to the world as such, engage that they possess the reasonable and ordinary qualifications of their profession, and are bound to exercise reasonable and ordinary care, skill, and diligence, but that is the extent of their liability. The burden of proof is upon the plaintiff in actions for malpractice to show that there was a want of due care, skill, and diligence, and that the injury was the result of such want of care, skill, and diligence:

Holtzman *v.* Hey, 19 Ill. App., 459; Baird *v.* Morford, 29 Iowa, 531; Vanhoover *v.* Berghoff, 90 Mo., 487; Craig *v.* Chambers, 17 Ohio St., 253; State *v.* Housekeeper, 70 Md., 162, and Leighten *v.* Sargent, 31 N. H., 119; also as to last proposition, Getchel *v.* Hill, 21 Minn. 464.

*Read before the Medico-Legal Society, March 8, 1893.

The reasonable and ordinary care, skill, and diligence which the law requires of physicians and surgeons are such as those in the same general line of practice, in the same general locality, ordinarily have and exercise in like cases:

Hathorn *v.* Richmond, 48 Vt., 557; Wilmot *v.* Howard, 39 Vt., 447; Utley *v.* Burns, 70 Ill., 162; Ritchie *v.* West, 23 Ill., 385; Almond *v.* Nugent, 34 Iowa, 300; Tefft *v.* Wilcox, 6 Kan. 46; Small *v.* Howard, 128 Mass., 131; Patten *v.* Wiggin, 51 Me., 594, and similar decisions in Missouri, New Hampshire, Oregon, and Texas.

A different rule has been held in Pennsylvania. In McCandless *v.* McWha, 22 Pa. St., 261, the court held that such skill was required "*as thoroughly educated surgeons* ordinarily employ," and a similar view was taken in Haire *v.* Reese, 7 Phila. (Pa.) 138, but the weight of authority is as first above stated.

The locality in which the physician or surgeon practices should be taken into account. One in a small town or sparsely-settled country district is not expected to exercise the care and skill of him who resides and has the opportunities afforded in a large city. He is bound to exercise the average degree of skill possessed by the profession generally in the locality in which he resides and practices:

Gramm *v.* Boener, 56 Ind., 497; Kelsey *v.* Hay, 84 Ind., 189; Small *v.* Howard, 128 Mass., 131; Gates *v.* Fleischer, 67 Wis., 504; Smothers *v.* Hauks, 34 Iowa, 286; Haire *v.* Reese, 7 Phila. (Pa.), 138; Nelson *v.* Harrington, 72 Wis., 591.

Physicians and surgeons should, however, keep up with the latest advance in medical science, and use the latest and most improved methods and appliances, having regard to the general practice of the profession in the locality where they practice, and it is a question for the jury to decide from all the circumstances of the case whether the physician or surgeon has done his duty in that respect: VanHooser *v.* Berghoff, 90 Mo., 487.

If a physician or surgeon departs from generally-approved methods of practice, and the patient suffers an injury

thereby, the medical practitioner will be held liable, no matter how honest his intentions or expectations were of benefit to the patient:

Carpenter *v.* Blake, 60 Barb. (N. Y.), 488; 50 N. Y., 606; 10 Hun (N. Y.), 358; 75 N. Y., 12; Lampher *v.* Phipor, 8 C. & P., 475; Sean *v.* Prentice, 8 East, 348; Slaler *v.* Baker, 2 Wils., 359.

Physicians and surgeons are bound to give their patients their best judgment, but they are not liable for mere error of judgment:

Tefft *v.* Wilcox, 6 Kan., 46; Patten *v.* Wiggen, 51 Me., 594; Carpenter *v.* Blake, 60 Barb. (N. Y.), 488; 10 Hun (N. Y.), 358; Wells *v.* World Disp. M. Ass., 45 Hun, 588; and see also Fisher *v.* Nichols, 2 Ill. App., 484.

If the error of judgment is so great as to be incompatible with reasonable care, skill, and diligence, the physician or surgeon would be liable:

West *v.* Martin, 31 Mo., 375; Howard *v.* Grover, 28 Me., 97.

If the patient in any way contributes to the injury by his fault or neglect he cannot recover for malpractice by the physician or surgeon:

Haire *v.* Reese, 7 Phil. (Pa.), 138; McCandles *v.* McWha, 22 Pa. St., 261; Reler *v.* Hewing, 115 Pa. St., 599; Polter *v.* Warner, 91 Pa. St., 362; Am. Rep., 668; Lower *v.* Franks, 115 Ind., 334; Chamberlain *v.* Porter, 9 Minn., 260; West *v.* Martin, 376.

And this doctrine holds where the physical weakness of the patient or his natural temperament is the contributory cause of the injury:

Haire *v.* Reese, 7 Phila. (Pa.), 138; Simond *v.* Henry, 39 Me., 155; Bogle *v.* Winslow, 5 Phila. (Pa.) 136.

Damages may be recovered for pain and suffering produced by the negligence or want of skill of the physician or surgeon, and also for loss of time and expense incurred on account of the improper treatment:

Tefft *v.* Wilcox, 6 Kan., 46; Wenger *v.* Calder, 78 Ill., 275; Chamberlain *v.* Porter, 9 Minn., 260; Stone *v.* Evans, 32 Minn., 243.

PRIVILEGED COMMUNICATIONS.*

BY CLARK BELL, ESQ.

This subject has recently excited public interest, and the state of the law of England being different from the existing law in many of the American States, I have thought that medical men and jurists on both sides the Atlantic would feel an interest in a statement of the law as it exists, with brief reference to the authorities, for use of both professions.

There is a wide divergence of opinion between the views of English common law jurists and the legal and medical profession in many States of the American Union upon this subject.

The statute of the State of New York provides as follows:

No person duly authorized to practice physic and surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon. (2 Rev. Statutes 406, part 3, chap. 7, title 3, sec. 73.)

By section 834 of the Code of Civil Procedure of the State of New York it is enacted as follows:

A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

The Code of Civil Procedure of New York provides as follows:

Section 833: "A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs." This provision may be also found in the Revised Statutes of New York, at 2 R. S., 406, part 3, ch. 7, tit. 3, sec. 72.

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*Read before the Medico-Legal Society, March 8, 1893.

Section 835: "An attorney or counsellor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment."

Section 836: "The last three sections (833, 834, and 835) apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient, or the client."

Section 836 was amended by an enactment of the Legislature of the State of New York in 1891, chap. 381, by adding to it the following language:

But a physician or a surgeon may, upon a trial or examination, disclose any information as to the mental or physical condition of a patient who is deceased which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section 834 have been expressly waived on such a trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will.

The following amendment was passed by the New York Legislature in 1892:

Section 1. Section eight hundred and thirty-six of the Code of Civil Procedure is hereby amended so as to read as follows:

§ 836. The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient, or the client. But a physician or surgeon may, upon a trial or examination, disclose any information as to the mental or physical condition of a patient, who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section eight hundred and thirty-four have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased is in question, by the executor or executors named in said will, or the surviving husband, widow, or any heir-at-law or any of the next of kin of such deceased, or any other party in interest. But nothing herein contained shall be construed to disqualify an attorney on the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate, from becoming a witness as to its preparation and execution in case such attorney is one of the snbscribing witnesses thereto.

Session Laws, N. Y., 1892, chap. 514, p. 111.

The following American States and Territories have, by legislative enactment, adopted substantially the provisions contained in the Revised Statutes of New York: Arizona

Territory, Arkansas, California, Idaho, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, Nevada, New York, Ohio, Oregon, Utah Territory, Washington, Wisconsin, Wyoming.

The States and Territories which have not legislated upon the subject are: Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Maine, Massachusetts, Mississippi, Minnesota, North Carolina, New Hampshire, New Jersey, New Mexico Territory, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia.

The fundamental principle of law which should control the question may be stated, and should be considered, as follows:

Privileged communications may be defined to relate to that class of evidence which, on grounds of public policy, courts decline to receive for the reason that its admission would entail greater mischief than its rejection, because of some collateral evil to third persons or to society in general.

The following examples illustrate the reason of the rule; Secrets of State; communications between a government and its officials; the secrets of the jury-room; judicial consultations; sources of information on which criminal prosecutions are based; communications of client to counsel; patient to physician, penitent to priest, and between husband and wife.

The discrimination against physicians in respect to confidential disclosures under the common law rule seems to be contrary to the principle of law above stated, and the legislation in New York and other States extending the privilege to physicians and surgeons has been in response to a universal public sentiment that public policy and the best interests of society would be promoted and subserved by in-

terdicting disclosures by physicians, which, from the nature of their intimate relation to and knowledge of the family secrets of their patients, they must necessarily acquire as well from observation as from disclosure. The language of the statutes is more in the interest of the patient, of the family relation, and of society, than of the physician.

"He shall not be allowed to disclose," is the language of the statutes.

The physician who has taken the usual oath of Hippocrates has sworn to keep such secrets inviolate, and that physician in an American State, where the privilege has not been extended by statute, who should disclose the secrets of his patient would encounter public odium and social ostracism, so universal is the public sentiment against any disclosures by a physician or surgeon of the professional secrets of his patients. By the common law of England the privilege which was extended to lawyers was not extended to physicians, and by no English statute has the privilege been extended to physicians.

Dutchess of Kingston Case, 20 How S. T. Pr., 613. Baker *vs.* R. R., 3 C. P., 91. Mahoney *vs.* Ins. Co. L. R., 6 C. P., 252. Wheeler *vs.* Le Marchant, 44 S. T. N. S., 631. 2 Starkie on Evidence, 228.

It will thus be seen that it was not a prohibition of the privilege to physicians, but the common law privilege had never been extended to them, nor to clergymen in England, by subsequent legislation.

The sentiment of English physicians, where the common law rule is enforced, is doubtless correctly stated by the eminent writer, Prof. C. Meymott Tidy, in his work on Legal Medicine :

The highest legal authorities in England have decided that medical men enjoy no special privilege with regard to secrets of a professional nature. In other words, no practitioner can claim exemption from answering a question because the answer may or would involve a violation of secrecy, or even implicate the character of his patient. This is the law, and however it may be defended upon legal grounds, we hope there are not a few

medical men who would prefer to sacrifice their personal liberty to their honor. It seems a monstrous thing to require that secrets affecting the honor of families, and, perhaps, confided to the medical adviser in a moment of weakness, should be dragged into the garish light of a law court, there to be discussed and made joke of by rude tongues and unsympathetic hearts. (1 Tidy's Legal Medicine, 20; Phila. ed.)

Prof. R. J. Kinkead, Lecturer on Medical Jurisprudence in Queen's College, Galway, speaks the sentiment of Irish medical men in saying:

In Great Britain and Ireland the medical practitioner is compelled to answer any question, although it may involve the violation of a solemn obligation to secrecy, and the betrayal of a trust confided to him in one of the most sacred relationships that can exist between men.

Many men, it is to be hoped, would prefer to sacrifice their liberty, rather than their honor and that of their profession. (Guide to Irish Medical Practitioner, by Prof. Kinkead, p. 426.)

By the Roman law, the privilege is extended to physicians. (Weiske, Rechts, Lexicon XV., 259, ff.)

By the Penal Code of France it is made a crime for a physician to disclose the secrets of his patient. (Bonière, Traité des Preuves, sec. 179.)

For an able exposition of the law upon the subject, see paper by Mr. Albert Bach, "*Medico-Legal Aspect of Privileged Communications.*" (Medico-Legal Journal, June, 1892, vol. X., p. 32.)